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No. 241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOHN TORPATS, *Petitioner*

v.

JOHN A. McCONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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John Torpats, by and through counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on March 23, 1962.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals is reprinted in the Appendix hereto on page 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1962 (App., infra, pg.). A timely petition for rehearing in banc was denied on April 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 102(c) of the National Security Act of 1947 is quoted in the Opinion below (page 2a of the Appendix).

QUESTION PRESENTED

Were genuine issues of material facts presented by the complaint and affidavits filed in this case, the Rule in *Service* v. *Dulles* being applicable.

STATEMENT

Petitioner was first employed by the Central Intelligence Agency, of which respondent was Director, on February 23, 1949. On January 30, 1961, his employment was terminated "pursuant to authority contained in Section 102(c), National Security Act of 1947. Petitioner filed suit in the United States District Court for the District of Columbia on April 11, 1961, praying for reinstatement in his position.

Sub-paragraphs (o), (p) and (q) of paragraph 6 of the complaint alleged in part:

> "o. On April 10, 1960, plaintiff requested and was granted by the Director of the Agency the right to appeal to him in person before any separation action was taken in his case by the Director.
>
> "p. In June of 1960, plaintiff was told that he would be granted a hearing 'on the 1958 charges and some others' under a specified Agency Regulation. . . .

q: Plaintiff was summoned to the Office of the Director on January 27, 1961, at which time, without giving plaintiff an opportunity to say anything, the Director, without reviewing the record, read plaintiff an already prepared order directing that plaintiff be separated unless he resigned or retired."

During the period of April 19, 1960, until January 30, 1961, Regulation 20-700, regularly promulgated by the respondent Director on June 8, 1959, was in effect with respect to separations in the Central Intelligence Agency. (Record p. 15).

Respondent moved for summary judgment or in the alternative to dismiss. In support thereof, he filed two personal affidavits, the second of which corrected erroneous averments of the first, which, as he averred were "set down through an oversight in the preparation thereof". In final effect, after correction, respondent's affidavit was that petitioner was discharged on the basis of fitness reports made by his supervisors; that certain senior officials had "reviewed the matter" and discussed it with petitioner; that respondent himself "thoroughly reviewed the case, which included consultation with the senior officials mentioned above"; that he "determined that Mr. Torpats was unsuitable for continued employment in the Central Intelligence Agency and deemed it necessary and advisable in the interests of the United States to terminate his employment"; and that while petitioner was given an opportunity to discuss his last year's assignment with representatives of the Director of Personnel and to present any facts he deemed appropriate, respondent did not appoint an "Employment Review Board." (Record App. 9-11, 18-21). Petitioner filed an affidavit in opposition to respondent's motion.

With respect to sub-paragraphs (o), (p) and (q) of the complaint as above quoted, petitioner averred the circumstances in which he applied for and was promised the right to appeal to the Director before a decision was made; the circumstances in which he claimed and the manner in which he was promised a "hearing" pursuant to Regulation 20-700; the representations made to him by officials which led him to believe that an Employment Review Board had been appointed to hear the charges against him and his defenses; the content of the proceedings on June 13, 1960, ostensibly pursuant to Regulation 20-700, before Messrs. Pollock and Lott and their failure to conform to the applicable regulation; the failure of the General Counsel to consider the merits of plaintiff's case, and the General Counsel's statement of the Director's duties under paragraph 102(c) of the Security Act of 1947; the fact that the assistant to the Inspector General stated he was not going to consider the merits of the case; the fact that the Deputy Director stated he did not read the transcript of the hearing; and the content of the conversation with respondent. (Record, App. 22-44).

Subsequently, respondent filed the affidavit of Emmett D. Echols, Director of Personnel, who averred that he had reviewed petitioner's work performance for the period May 15, 1959 through June 1960; that he had determined that it did not meet Agency standards; that he had recommended his termination; that no Employment Review Board had been appointed to advise the Director concerning his action in January 1961. (Record App. 45-46).

On July 27, 1961, respondent's motion for summary judgment was granted by the District Court. The United States Court of Appeals for the District of Columbia Circuit affirmed.

REASONS FOR GRANTING THE WRIT

The question in this case is one of general importance and substance relating to the construction of Section 102(c) of the National Security Act of 1947, which has not been but should be settled by this Court and the Court of Appeals has not given proper effect to the decision of this Court in *Service* v. *Dulles*, 354 U.S. 363 (1957).

I. Under Section 102(c) of the Security Act of 1947, Regulation 20-700 of the Central Intelligence Agency required respondent to accord to petitioner a fair hearing which he has alleged was denied to him.

Respondent in this case adopted Regulation 20-700 on June 8, 1959; he admitted in his affidavits that these regulations applied to involuntary separations in the Central Intelligence Agency. Petitioner's separation was involuntary; the separation occurred while Regulation 20-700 was in effect. *Service* v. *Dulles*, *supra*, holds that an agency head is bound by such regulations, even if he has discretionary authority; and petitioner has alleged that respondent violated the regulation in separating him. In such circumstances the only possible ground for disputing the materiality of the issues raised by the complaint and affidavits would be that Regulation 20-700 was deficient in content to give petitioner a right to a hearing and review by respondent.

Petitioner concedes that the Government, as an employer, has an absolute "right" to terminate the employment of its employees unless there is some statute or regulation limiting this right. There is a great distinction to be noticed between an abstract "right" held by our Government and the manner in which it is exercised by the person representing the Govern-

ment. Although Congress may make a man the instrument by which sovereign power is to be applied, it does not, indeed it cannot, exempt him from the constitutional limitations applicable to the execution of the power of the sovereign.

The statute applicable to respondent's duty in this case, granted him "discretion" to terminate the employment of any employee "whenever he shall deem such termination necessary or advisable in the interests of the United States". Here, as in *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1953), the word "discretion" means that respondent must exercise his authority "according to his own understanding and conscience". He has, thus, to make a decision, but he also has a substantive standard to which he must conform, i.e. he must exercise his authority only in furtherance of the "interests of the United States."

The imposition of this substantive standard by the Congress carries with it a duty to determine what the interests of the United States are in any case of involuntary separation. The phrase "in the interests of the United States" is not an empty one. It requires the respondent to be objective, to wield his axe; only after consideration of the facts. His decision may ultimately result in personal hardship to the employee, but this does not mean that he may disregard the employee entirely. Congress cannot be presumed to have authorized the defendant to make a "hunch" decision. Reason is necessarily impiled. The Courts have said that discretionary authority, such as is here involved, cannot be abused; that decisions with such authority must not be made arbitrarily. *Croker* v. *United States*, 130 Ct. Cls. 567, 574, 127 F. Supp. 568, 572 (1955). Here, at the very least, the respondent

must be able to say that the advantage which will flow to the United States by severance of this employee will overbalance the advantage that will flow to the United States by retaining his services.

Such a decision requires the head of the agency to consider the contribution made by the employee in the past, the contribution he may make in the future and, if he finds these to be valuable, whether some other decision besides separation of such employee would not redound to the greater interest of the United States.

These considerations imply that whatever the statute says, a process is involved in making the determination of substance. In short, evidence must be considered and a choice must be made.

In this suit, petitioner contends, respondent laid down express rules to guide his subordinates and himself in exercising the sovereign power which the statute has assigned to his discretion. Petitioner thus invokes the principle which this Court has applied in a line of cases beginning with *Accardi* v. *Shaughnessy*, *supra*, and running through *Service* v. *Dulles*, *supra*, *Watson* v. *United States*, 162 F. Supp. 755 (Ct. Cls. 1958) and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). Mr. Justice Frankfurter epitomized the principle by saying that "he that takes the procedural sword shall perish with that sword". *Vitarelli* v. *Seaton*, *supra*, at 547.

In both *Service* and *Vitarelli*, as well as in the related case of *Greene* v. *McElroy*, 360 U.S. 474 (1959), the plaintiff had sought to test the administrative decision according to the constitutional standards of due process, invoking the 5th Amendment for that purpose. In each of these three cases, however, this Court

refused to "get to" the constitutional argument and rested its decision solely on what Mr. Justice Frankfurter finally characterized as a "judicially evolved rule of administrative law". *Vitarelli* v. *Seaton*, *supra*, at 547.

But the view that the rule has been judicially evolved does not include the principle that an agency head, who must use his discretionary authority to achieve a substantive goal, may become a supra-constitutional officer by the mere device of not issuing regulations. The exercise of discretionary authority according to a substantive standard involves the process, whether the agency head has bound himself expressly to a particular procedure or not; and the Constitution requires the process always to be an objective, not subjective one. The principle is inherent in our conception of law and government. It cannot be escaped either inadvertently or adverteintly as long as our present Constitution stands.

Naturally where the agency head, in exercise of valid rule making power, has issued regulations the regulations have the force of law, a right arises thereby in an employee to whom the regulations apply, and he may enforce it as a personal right.

This principle has been applied by the Executive Branch, and constructively approved by Congress, in interpreting the so-called McCarran Rider, which differed in pertinent wording from the statute involved here only in that (a) it was applicable to the Secretary of State instead of the Director of Central Intelligence and (b) the Secretary of State was authorized to act in his "absolute discretion" instead of in his mere "discretion" as is the case of the Director of Central Intelligence.

The McCarran Rider was first enacted in 1946 (Department of State, Justice, Commerce and the Judiciary Appropriation Act, 1947, July 5, 1946, c 541, Title I, 60 Stat. 446, 458). In the Spring of 1950 the State Department, in reporting to Congress on the administration of the Department's security and loyalty programs, stated that

> "In (its) considered view the McCarran rider was subject to procedural limitations. The McCarran rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims." Sen. Rep. 2108, 81st Cong. 2d Sess. 15-16, as quoted in *Service* v. *Dulles, supra,* at 378.

Subsequently, the McCarran Rider having been reenacted in the General Appropriation Act, 1951 (September 6, 1950, c. 896, paragraph 1213, 64 Stat. 595, 768), the President instructed the Secretary of State as follows:

> I am sure you will agree that in exercising the discretion conferred upon you by Section 1213, every effort should be made to protect the national security, without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.
>
> "In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of Section 1213 of the General Appropriation Act." (As quoted in *Service* v. *Dulles, supra,* at 379).

Public Law 733, referred to by the President in the foregoing passage from his letter of September 6, 1950, was the Act of August 26, 1950, c. 803, Section 1, 64 Stat. 476, 5 U.S.C. Section 22-1. This statute provided a procedure of notice and hearing not unlike that which the State Department subsequently adopted under still another re-actment of the McCarran Rider, viz. the Act of October 22, 1951, c. 533, Section 103, 65 Stat. 581. Section 393.1 of the State Department's regulations provided:

> "The standard of removal from employment in the Department of State under the authority referred to in Section 391.3 shall be that on all the evidence reasonable grounds exists for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." U.S. Department of State, Manual of Regulations and Procedures (1951) Vol. I, Sec. 393.1.

In 1957, the McCarran Rider, the President's and the State Department's interpretations, and the State Department's regulations, all as partially quoted above, came before this Court in *Service* v. *Dulles, supra.* The Court found that Congress had repeatedly re-enacted the McCarran Rider after Congress had been "advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him . . ." Id. at 379, and the Court held that in this way Congress had confirmed the interpretation of the statute made by the Executive Branch of the Government.

A similar argument may be made for Sec. 102(c) of the National Security Act. Three years after the

State Department had notified Congress of the Executive Branch's interpretation of the McCarran Rider. Congress revisited Sec. 102 of the National Security Act and adopted extensive amendments, but without changing the wording of sub-section (c). Act of April 4, 1953, c. 16, 67 Stat. 20.

When the National Security Act was first enacted in the 80th Congress, the committee reports said nothing that would indicate a Congressional intent to distinguish the effect of sub-section (c) from the effect given the McCarran Rider by the State Department in its report to Congress in the Spring of 1950. See H. Rep. No. 1051, July 24, 1947 and S. Rep. No. 239, June 5, 1947, both in U.S. Code Congressional and Administrative News, 80th Congress, 1947, at 1483, 1484, 1487, 1494. Moreover, had there been such an intent, Congress had ample opportunity to write it into the sub-section when it amended the section in 1953.

The McCarran Rider and Sec. 102(c) of the National Security Act, under which respondent issued Regulation 20-700 and exercised discretionary authority in this case, are essentially the same and mean the same. It follows that Sec. 102(c) is subject to procedural limitation.

The decision which had to be made in this case was whether the interests of the United States would be best served by retaining or separating petitioner. To make that decision, it was obviously necessary to hear him in his own behalf, otherwise information on one side of the question might be lacking. Obviously, information concerning him, even when given by himself, might be untrustworthy unless the hearing is a fair one; the person or persons who hear him must be

impartial. If the employee's separation is to benefit the United States, someone must say why, and the employee must be fairly advised of these reasons for his separation and given an opportunity to answer and to give explanations and to introduce evidence. Lastly, the person authorized to make the decision must know from the impartial hearing officer (if someone other than the deciding officer holds the hearing), the findings made at the hearing before he decides. But the process actually provided will not be regarded as due process merely because someone went through the motions. The process must be in good faith, and not in mockery. These are fundamental principles, hardly needing citations of authority. They are taken from Corwin's edition of the Constitution, Analysis and Interpretation (1952) 846, 849.

Turning to Regulation 20-700, it will be seen that the foregoing requirements have been provided with but little variation from the State Department Regulation quoted above. The Regulation does not specifically mention a "hearing", but there is a reference to "all pertinent information", including that which is "favorable" as well as that which is unfavorable to the employee, and there is a provision for a tribunal called an Employment Review Board, which the Director may substitute for his own services if he chooses. Properly interpreted, these provisions clearly mean that if an Employment Review Board is appointed, respondent must review its findings and recommendations directly before he exercises his statutory discretion; if an Employment Review Board is not appointed, then respondent himself must review, impartially, the employee's record, the basis for his proposed separation, such evidence and testimony as the em-

ployee may submit after notice of the basis on which he is proposed to be separated.

This Court in the *Service* case, at page 388, said of the regulation promulgated by the State Department pursuant to the McCarran Rider:

> "The essential meaning of this section, in other words, was that the Secretary's decision was required to be on the merits."

Petitioner submits that respondent's regulation means the same.

Petitioner has alleged by his complaint that respondent did not comply with his own regulations and therefore was either in the dark as to the merits or participated in an abuse of authority when he made his decision. For the most part, respondent has in his affidavit ignored these allegations, clearly material under the theory of *Service* v. *Dulles*, *supra*, as above demonstrated. In *Watson* v. *United States*, the Court of Claims first denied relief on the ground that a probationary employee was not entitled to notice and hearing under the Civil Service statutes and regulations. *Watson* v. *United States*, 137 Ct. Cls. 557 (1957). This Court, however, granted a writ of certiorari and remanded the case for further proceedings "in the light of *Service* v. *Dulles*", *Watson* v. *United States*, 355 U.S. 14 (1957).

2. There were genuine issues of material fact presented by the complaint and the affidavits.

Service v. *Dulles*, *supra*, established that even where a head of agency has discretionary authority to discharge an employee, he must follow such objective rules as he has imposed upon himself. This principle always

presents two issues of material fact in every case in which a discharged employee contends, with appropriate allegations, that he had been unfairly discharged by an agency head who holds discretionary authority, viz. (1) whether the agency head subjected the employee's involuntary separation to procedural regulation, and (2) if so, whether he followed such regulation in effecting the employee's separation.

In this case, petitioner has alleged that he claimed and that he was promised, on the basis of regulations promulgated by respondent, a fair and impartial hearing of the proposal to separate him, and (2) that while he was accorded a hearing, such hearing was not fair and impartial, and the manner in which decisions were made concerning his case did not conform to the applicable regulations.

Since no answer was filed, petitioner's allegations were clearly adequate, under the theory of the *Service* case, to sustain a cause of action. Consequently, if summary judgment for respondent is to be upheld, the Court must find in respondents supporting affidavits evidence that will put the case in the posture of not presenting any genuine issue of material fact, and the burden was on the movant, respondent here. *Wittlin* v. *Giacalone*, 81 App. D.C. 20, 154 F. 2d 20, 22 (1946).

The motion itself tests the materiality of the genuine issues of fact, if any, by putting the plaintiff's theory of law in issue for judicial decision. Under Rule 56(e), an affidavit accompanying a defendant's motion for summary judgment, to be effective at all, must offer admissible evidence in proof to show that plaintiff's formal allegations do not present a genuine issue. This evidence must be more than a mere negation of

the ultimate material fact alleged by plaintiff, which is to say, as has been held, that defendant will not be allowed to "push the other party out of court by swearing he has no case". *Belanger* v. *Hopeman Bros., Inc.* 6 F.R.D. 459, 461 (D. Me. 1947).

But this is precisely what respondent's affidavits attempted to do. Petitioner alleged that he was "told that he would be granted a hearing . . . under specified Agency regulation" and that respondent granted him "the right to appeal" to him "in person before any separation action was taken in his case"; and by affidavit petitioner supplied evidentiary details to support these allegations, including the designation of two officers of a hearing board by officers with regularly delegated authority, the representations of the same officers that a hearing would be held pursuant to Regulation 20-700 and the actual proceedings of the hearing before the Board. With respect to these allegations and evidence the respondent (and one of his subordinates) merely swore that respondent "did not appoint an Employment Review Board in this case". This averment, however, was in the nature of an answer; it merely put one of the alleged ultimate facts in issue, which the Court is not allowed to resolve on a motion for summary judgment.

The same principle applies to other material allegations. Petitioner alleged that respondent acted "without reviewing the record" and "without giving plaintiff an opportunity to say anything" (both being material under the provisions of the regulations and *Service* v. *Dulles*), and this he was ready to prove to a trier of fact, as is shown by his affidavit of the proceedings in respondent's office on January 27, 1961. To these allegations and offer of proof, respondent merely

swore that he "personally reviewed the employment record of Mr. Torpats . . ." and "thoroughly reviewed the case, including consultations with the senior officials mentioned above". Whether he reviewed the records or the case was thus put in issue, for respondent had no better right to be believed on motion than petitioner; and the averment does not show the formal allegations to lack genuiness. If the reference to consultation with the senior officials is evidence of respondent's having reviewed the case, petitioner's affidavit to the effect that these same senior officials had admitted that they had relied on the reports made by his biased accusers instead of on the transcript of the proceedings before the two-man board puts the weight of respondent's averment in doubt. Petitioner is entitled to cross-examine all these officials before a trier of fact to determine whether a good faith review, consistent with the regulations, was given.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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